DATE: June 15, 1990
TO: The Honorable Mayor and City Council
FROM: City Attorney
SUBJECT: Limits on Ex Parte Communications By Councilmembers

I. INTRODUCTION

Questions recently have been raised informally on the legal propriety of ex parte contacts between councilmembers and third parties and councilmembers and city staff regarding projects that have come or will come before the City Council. Such questions are troublesome because they place in issue the legal effectiveness of important actions taken by the Council in many land use matters. This subject has been addressed a number of times in the past, but, in retrospect, we think we have not treated it as comprehensively as necessary to give the Council the guidance it needs in the complicated proceedings it faces regularly.

Deputy City Attorney Cristie C. McGuire of my staff was directed to study the subject in depth for the purpose of obtaining further information and evaluating the issues faced by city staff, the Council and its staff. To illustrate the issues raised by the information obtained by Deputy City Attorney McGuire, we decided to summarize it in the form of hypotheticals. The hypotheticals are based on interviews and review of documents available to the City Attorney for purpose of this review.

Ms. McGuire's research discloses a need to provide advice and clear direction to councilmembers, their staffs, Planning Department officials and other city employees about the organizational framework through which San Diego City government functions. It seems appropriate at this time, therefore, to state our views on the subject as clearly as possible.

As in the case of conflict of interest issues, the conduct in question involves complicated facts. Easily understood definitive rules are unavailable. Simple solutions to complicated problems are rarely found in real life. Conclusions, therefore, depend on the particular fact situations presented.

Nevertheless, it is valuable to gain guidance for the future from examples of the present. As prospective situations develop, we will attempt to give advice as they occur. Hopefully, all those involved in the process will recognize problem areas more quickly with the aid of this opinion.

The opinion was prepared by a team coordinated by Ms.

McGuire, who is its principal author, with the research and writing assistance of Senior Legal Intern Jennifer Hooper and research assistance of Senior Legal Intern Allan Lolly. Other team members are City Attorney John W. Witt, Assistant City Attorney Curtis M. Fitzpatrick, Senior Chief Deputy City Attorney Jack Katz, Chief Deputy City Attorney Frederick C. Conrad and Deputy City Attorneys Janis Sammartino, John K. Riess and Thomas F. Steinke.

In conjunction with this opinion, the research team prepared a set of guidelines published in a separate Report to the Honorable Mayor and City Council, dated June 15, 1990, to help you to determine when it is legally appropriate to involve yourselves with the land development process.

II. BACKGROUND FACTS/HYPOTHETICALS

A. Hypothetical No. 1:

In a written memorandum, Councilmember A requested review of all residential projects greater than eight (8) dwelling units and all commercial or industrial projects greater than 10,000 square feet within the councilmember's district. Councilmember A requested review of these projects prior to approval by the Planning Director.

B. Hypothetical No. 2:

Councilmember B sent a comment letter on a Draft Environmental Impact Report (EIR) to the Planning Department during the California Environmental Quality Act (CEQA) public review period. The Planning Department had sent a copy of the draft EIR to each councilmember, for information only, pursuant to Planning Department policy. While the cover letter invited public comment, no other councilmember has commented on any draft EIR in the recent past. However, Councilmember B commented on the draft EIR via a letter typed on district letterhead. The letter addresses the adequacy of the EIR and requests changes in the analysis and conclusions.

The draft EIR on which Councilmember B commented involves a coastal development permit, revisions to a vesting tentative map and a planned residential development permit. The final EIR will be considered when deciding whether to approve or disapprove each project.

C. Hypothetical No. 3:

In a memorandum addressed jointly to a Deputy City Manager and the Planning Director, Councilmember C expressed "extreme displeasure" with a project that is about to go to a Planning Director hearing. The Councilmember indicated disagreement with the department's recommendation regarding the alignment of a

major city street, and expressly stated an intent to actively oppose the entire project unless the road alignment is shifted to the north. Despite Councilmember C's express disapproval of the Planning Department's recommendation, the Planning Director's hearing was held and the department's recommendation stood.

D. Hypothetical No. 4:

Councilmember C, by written memorandum to a Deputy City Manager and the Planning Director, requested that the Planning Director's hearing on a major land development project be continued due to the unresolved road alignment issue described in hypothetical No. 3. The hearing had been previously scheduled by the Planning Department. Councilmember C's memorandum was dated three (3) days before the scheduled hearing date. The hearing was held as scheduled. But Councilmember C's memoranda regarding the alignment of the street have caused the Planning Department to take further action on an issue otherwise resolved. As a result, a new EIR may be needed to address this issue.

E. Hypothetical No. 5:

Councilmember D contacted the Planning Department staff and initiated a meeting with a principal planner working in the Environmental Analysis section in the Planning Department, the Director of the Engineering and Development Department and other members of the Planning Department. During the meeting, Councilmember D made inquiries into the draft EIR that was being prepared for the major project involving the extension of a major city thoroughfare. Although Councilmember D was merely inquiring into specific areas of the draft EIR, the Councilmember's point of view was made clear to the planning staff.

F. Hypothetical No. 6:

Councilmember E expressed concern with development in a coastal community within the Councilmember's district in the last year. Councilmember E indicated a wish to schedule a tour of the

last ten (10) residential developments completed and ten (10) residential developments in progress in that community.

G. Hypothetical No.7:

ABC Community Plan was adopted in 1988. Subsequently, a number of development agreements were approved by the full Council consistent with the community plan. Shortly thereafter, a grass-roots community group attempted to have some of those development agreements rescinded. Meanwhile, an election was held and the incumbent councilmember for that district was replaced by Councilmember F whose political platform included promises to revise some of the decisions made pursuant to the 1988 community plan, and specifically to rescind the existing

development agreements.

Meanwhile, XYZ Corporation, a developer that owns a substantial portion of land in the ABC community, sought the views of Councilmember F on new community plan amendments. Councilmember F and XYZ Corporation exchanged drafts of proposed community plan amendments and entered negotiations to develop a draft amendment suitable to both of them, without the participation or input of the Planning Department staff or the community planning group. There was no application pending for a community plan amendment, but XYZ intended to file an application for one after the corporation and Councilmember F reached an agreement on a draft proposal.

H. Hypothetical No. 8:

PQR Corporation, a developer, filed an application to rezone property. In the course of its analysis, planning staff determined that a community plan amendment and other discretionary permits would be required if the rezoning were approved. A hearing on the rezoning and community plan amendment and other permits was held before the Planning Commission. The applications were denied. The matter was scheduled to be heard by the full Council two months following the Planning Commission hearing. Between the Planning Commission and City Council hearings, PQR Corporation contacted Councilmembers G and H several times, both personally and by telephone, to discuss the applications. In some instances, PQR Corporation talked to the councilmember directly; at other times PQR talked to the councilmember's staff.

With Councilmember G and G's staff, PQR Corporation vehemently complained that the Planning Commission rejected PQR's application because the Planning Department had put incorrect facts regarding the project in its written recommendation to deny the application.

With Councilmember H and H's staff, PQR raised the same complaint as with Councilmember G, but also brought in alternative proposals (including maps, drawings, etc.), in an attempt to negotiate a revised project that would be acceptable to Councilmember H. The PQR project, if approved, would be in H's district.

I. Hypothetical No. 9:

A Planning Commission member was appointed to that Commission due to affiliation with a well-known citizens' group. On an application to rezone a single parcel of land from residential to neighborhood commercial, the Planning Commission member met informally with members of the citizens' group with whom the

member had formerly been affiliated to discuss the details of the proposed rezoning and project to obtain that group's views. These meetings and the subject matters were not disclosed at the Planning Commission's public hearing on the proposed rezoning.

J. Hypothetical No. 10:

In conjunction with a major land development project, a freeway interchange improvement agreement was negotiated between a developer, the GHI Corporation, and the City as part of GHI Corporation's conditions of approval for the land development project. After the City Council had formally approved the agreement and authorized the City Manager to sign it, Councilmember J asked GHI to negotiate changes to that agreement. Councilmember J and GHI Corporation met outside the presence of the City Manager and planning and engineering staff and outside the presence of other interested parties to negotiate different terms. The renegotiated agreement was brought back to full Council for approval.

III. APPLICABLE LAW

The appropriateness of a councilmember having contacts with staff and third parties at very early stages in the development approval process when the matter will come before the Council in the future raises substantial issues under the procedural due process requirements of the federal and state constitutions and the San Diego City Charter. Procedural due process requirements are generally discussed under the term "ex parte communications." The charter issues pertain to the authority of the Planning Director and the City Manager. The procedural due process requirements and charter limitations will be discussed separately.

A. PROCEDURAL DUE PROCESS: The Right to a Fair Hearing by a Fair Tribunal Applies to Administrative Agencies that Adjudicate --- The "Ex Parte Communications" Issue

At the outset, it will be helpful to note the meaning of "ex parte communications." Contacts or communications outside public hearings between councilmembers and members of planning staff and between councilmembers and third parties regarding projects that may come before Council, are most often referred to as "ex parte contacts" or "ex parte communications." Black's Law Dictionary defines "ex parte" as follows: "On one side only; by or for one party; done for, in behalf of, or on the application of one party only." Black's Law Dictionary 517 (5th ed. 1979). Thus, ex parte contacts are contacts made by one party outside the presence of other interested parties. Such contacts raise two distinct issues under the constitutionally based doctrine of

procedural due process.

The first issue involves an individual's right to an impartial tribunal. It is raised by the hypotheticals described briefly above. Essentially, in each of the hypotheticals, councilmembers or planning commissioners are involving themselves very early in projects that will later be before them for decision. This involvement includes both input to the Planning Department and communications with interested third parties, such as developers, community planning or other citizens groups. Arguably, each pre-involvement biases the councilmember1 and causes the entire preceding to be tainted.

The second issue involves an individual's right to know what evidence is used by the City Council in reaching a decision. This is the traditional "ex parte contact" concern. Under the rules governing this issue, the City Council is required to disclose evidence it considers in reaching a decision at a hearing. Thus, if a councilmember gathers evidence outside of the hearing and relies on it as a basis for decision, the councilmember must disclose the evidence at the hearing. Both of these issues will be discussed below.

1. Quasi-judicial Proceedings and Legislative Proceedings Distinguished

As a threshold matter, it is necessary to determine what types of council proceedings trigger the procedural due process requirements embodied in the state and federal constitutions.

1For purposes of this analysis, the term councilmember will include reference to planning commissioner unless otherwise stated.

The basis of these requirements is found in the Fifth and Fourteenth Amendments to the United States Constitution and article I, sections 7 and 15, of the California Constitution, which guarantee that no one may be deprived of his or her property without due process of law. The federal and state constitutions' guarantee of procedural due process apply to persons threatened with deprivation of significant property interests. Laupheimer v. State of California, 200 Cal. App. 3d 440, 455 (1988), rev. denied (1988).

"The fundamental requirement of due process is the opportunity to be heard at a 'meaningful time and a meaningful manner.'" Matthews v. Eldridge, 424 U.S. 314, 333 (1976). This right of "due process" varies with the type of legal proceeding at issue. Essentially, the more legislative in nature a proceeding is, the fewer due process rights will attach; the more judicial in nature a proceeding is, the more due process rights

will attach. Therefore, the characteristics of each type of proceeding - legislative or quasi-judicial - are distinguished below. At this point, it should be noted that the terms quasi-judicial and adjudicatory are used interchangeably. Both terms refer to the character of particular proceedings which must be accompanied with certain formalities and safeguards characteristic of the judicial process. 1 Am. Jur. 2d Administrative Law section 161, p. 965 (1962).

Many more due process rights apply to protect parties in quasi-judicial proceedings held by the City Council than they do to the Council's purely legislative proceedings. Thus, it is necessary to determine which proceedings in the land use area are adjudicatory and which proceedings are legislative. The distinction is not always clear.

Legislative action "is the formulation of a rule to be applied to all future cases . . . ." Strumsky v. San Diego County Employees Retirement Assoc., 11 Cal. 3d 28, 35, n.2 (1974). In general, legislative actions are political in nature. They "declare a public purpose and make provisions for the ways and means of its accomplishment." Fishman v. City of Palo Alto, 86 Cal. App. 3d 506, 509 (1978).

In contrast, quasi-judicial proceedings apply law that already exists to determine "question ┌sσ of right or obligation, or of property." Smith v. Strother, 68 Cal. 194, 197 (1885); see also Strumsky v. San Diego County Employees Retirement Assoc., 11 Cal. 3d 28, 35, n.2 (1974). "┌Aσn adjudicatory act applies law to determine specific rights based upon specific facts ascertained from evidence adduced at a hearing." City of Rancho Palos Verdes v. City Council, 59 Cal. App. 3d 869, 883 (1976).

Hence, a matter is quasi-judicial when the action to be taken is "essentially judicial." Where an agency is required to (1) hold a public de novo hearing, (2) consider the evidence adduced and then, (3) in its discretion, allow or disallow requested permits and make written findings in support of its determination, the process has been held to be "quasi-judicial." Natural Resources Defense Council, Inc. v. California Coastal Zone Conservation Commission, 57 Cal. App. 3d 76, 83 (1976). Similarly, an action has been held to be quasi-judicial when it requires an agency to apply a general rule to a specific interest, such as a zoning affecting a single piece of property, a variance or a conditional use permit. Allison v. Washington County, 24 Or. App. 571, 575 (1976), citing San Diego Building Contractors Assn. v. City Council, 13 Cal. 3d 205 (1974), for absence of notice and hearing requirements for legislative acts,

as distinguished from quasi-judicial acts.

If agency decisions possess both legislative and quasi-judicial aspects, the nature of the agency's "dominant concern" in making the decision determines the decision's character. City of Rancho Palos Verde v. City Council, 59 Cal. App. 3d 869, 883-885 (1976). The fact that an agency holds hearings and takes evidence in reaching its decision does not alone make the final action quasi-judicial; however, in many instances, such procedures ensure that procedural due process is afforded to an individual in a particular proceeding. M. Remy, T. Thomas, S. Duggan and J. Moose, Guide to the California Environmental Quality Act (CEQA), (hereafter "Guide to CEQA") 138 (1989) citing Patterson v. Central Coast Regional Commission, 58 Cal. App. 3d 833, 841 (1976).

a. Comparison with Election Law Arena

In the election law arena, courts struggle with making a similar distinction between administrative acts and legislative acts. The distinction is necessary in that arena to determine whether a city council's action will be subject to the referendum or initiative process. The distinctions drawn in the election law cases shed light on the distinction between legislative and quasi-judicial proceedings which is at issue here.

The difference between legislative and administrative acts for purposes of initiative or referendum is set forth succinctly in McKevitt v. City of Sacramento, 55 Cal. App. 117 (1921), as follows:

> Acts constituting a declaration of public purpose, and making provision for ways and means of its accomplishment, may be generally
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> classified as calling for the exercise of legislative power. Acts which are to be deemed as acts of administration, and classed among those governmental powers properly assigned to the executive department, are those which are necessary to be done to carry out legislative policies and purposes already declared by the legislative body, or such as are devolved upon it by the organic law of its existence.

In addition, Martin v. Smith, 184 Cal. App. 2d 571, 575 (1960), provides as follows:

> Again it has been said: "The power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it

is administrative in its nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it." (Citing 5 McQuillin, Municipal Corporations, p. 255-256 (3d Ed.).

Thus, all methods of carrying out a plan adopted by the legislative body are not necessarily legislative in nature. In fact, an implementation measure of an existing legislative act is administrative in nature. Fishman v. City of Palo Alto, 86 Cal. App. 3d 506 (1978).

The reasoning of the election law cases supports the proposition that when determining whether an action is quasi-judicial, the focus must be placed on the substance of the proceeding, as opposed to the underlying form of the action taken. For example, adoption of an ordinance is clearly a legislative act under the San Diego City Charter (section 16). However, as demonstrated in this opinion, the procedures in a purely legislative proceeding may not be enough to protect the rights of all parties. Instead, procedures more suited to quasi-judicial proceedings may be required to provide the proper foundation for adoption of the legislative act. Thus, a proceeding may be required to be treated as quasi-judicial despite the fact that the end result of the proceeding is in the form of a legislative act, such as an ordinance.

A proceeding should be treated as quasi-judicial if it requires traditional concepts of fundamental fairness in order to protect fundamental rights. Concepts such as the right to receive individual notice of a proceeding often signal that fundamental rights, such as property rights, may be affected as a result of a given proceeding. Unfortunately, existing land use case law confuses the issue, because some courts have confused the form of the act required to take a particular land use action with the procedural protections that should be accorded to reach that action.

b. California Land Use Case Law

How California courts treat zoning actions is a classic example of this phenomenon. Despite the fact that zoning is considered to be a purely legislative act (San Diego Building Contractors Association v. City Council of City of San Diego, 13 Cal. 3d 205, 212 (1974)), both California Government Code section 65804 and San Diego Municipal Code sections 101.0206 and 101.0207 require that Council action take place in a public hearing only after individual notice and a fair opportunity to be heard has been afforded those interested. Thus, some standards

of "procedural due process" are already afforded to parties under current law. The question posed by the hypotheticals in this opinion is what additional protection should be granted to pass constitutional muster. Anderson's American Law of Zoning, section 4.11, p. 169; Longtin's California Land Use Regulation, (section 2.160(3), p. 287).

While the above distinction between quasi-judicial and legislative proceedings is helpful, the courts have not created a bright line test. Land use case law provides limited guidance in determining which proceedings are legislative and which are quasi-judicial.

Set forth below for the reader's quick reference are several land use decisions held by California courts to be legislative or quasi-legislative actions. These cases are not set forth here as the definitive word on what types of procedural protections should be provided in each case. Rather, these cases merely characterize particular actions as legislative or quasi-legislative in nature.

- The adoption of a general plan (O'Loane v. O'Rourke, 231 Cal. App. 2d 774, 784-785 (1965));
- the amendment of a general plan (Yost v. Thomas, 36 Cal. 3d 561, 570 (1984));

- the enactment of measures that zone or rezone property (San Diego Building Contractors Assoc. v. City Council, 13 Cal. 3d 205, 212-213 (1974), appeal dismissed, 427 U.S. 901 (1976))2;
- the decision to incorporate areas or to annex land to existing cities (Bookout v. Local Agency Formation Commission, 49 Cal. App. 3d 383, 386 (1975));
- the deannexation of land from a city (Richards v. City of Tustin, 225 Cal. App. 2d 97, 100 (1964));
- the adoption of a resolution to acquire land for a city park (Reagan v. City of Sausalito, 210 Cal. App. 2d 618, 624 (1962)); and
- the decision to construct an access road to a previously planned community (Wheelright v. County of Marin, 2 Cal. 3d 448, 457 (1970), cert. denied, 400 U.S. 807 (1970)).

Guide to CEQA, at 139 (1989).

In our opinion, if some of the above cited cases were revisited today, the courts may well characterize the actions as quasi-judicial so that procedural due process safeguards would be provided. For example, zoning and annexations of small parcels of land by their enabling legislation already require individual

notice and hearing. In our view, a court today would likely find that these actions require additional procedural due process safeguards. The requirements for individual notice and hearing also illustrate the fundamental fairness already embodied in the enabling legislation. Procedural due process furthers this notion of fairness by providing more protections, such as the right to a fair and impartial tribunal.

2This case is often cited for the proposition that all zoning decisions are legislative, no matter what the subject or size of parcel affected. It is worth noting, however, that the zoning ordinance at issue in this case involved a 30-foot height limitation to be applied throughout a substantial area of the city. Clear language in this case indicates that initial zoning or rezoning of a small area or single parcels would be quasi-judicial in nature. 13 Cal. 3d at 212. This view is supported by dictum in Horn v. County of Ventura, 24 Cal. 3d 605, 613 (1979). Other jurisdictions support the view that rezoning small parcels is a quasi-judicial act. See, e.g., Pleas v. City of Seattle, 112 Wash. 2d 794, 774 P. 2d 1158 (1979), and Heilman v. City of Roseburg, 39 Or. App. 71, 591 P. 2d 390 (1979).

The following types of land use projects have been held by California courts to be quasi-judicial:

- ┌Tσhe granting of use permits (Johnston v. City of Claremont, 49 Cal. 2d 826, 834 (1958));
- the granting of zoning variances (Topanga Association for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 517 (1974));
- the approval of tentative subdivision maps (Horn v. County of Ventura, 24 Cal. 3d 605, 612 (1979));
- the issuance of coastal development permits (Patterson v. Central Coast Regional Com., 58 Cal. App. 3d 833, 840-841 (1976));
- the decision whether to approve a proposed Williamson Act contract cancellation. ┌The Williamson Act (Government Code section 51200 et seq.) empowers local government to establish "agricultural preserves."σ (Sierra Club v. City of Hayward, 28 Cal. 3d 840, 849 (1981)); and
- the approval of "timber harvesting plans" ("THPs") (Laupheimer v. State of California, 200 Cal. App. 3d 440, 450 (1988)).

Excerpted from Guide to CEQA, at 139-40 (1989).

The reasoning by which the above classifications have been

reached is explained by the California Supreme Court in Arnel Development Co. v. City of Costa Mesa, 28 Cal. 3d 511 (1979). The court states:

> In classifying such decisions as adjudicative, courts have emphasized that the decisions generally involved the application of standards established in the zoning ordinance to individual parcels ┌citation omitted┐ and often require findings to comply with statutory requirements or to resolve factual disputes.
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> . . . .
>
> It is significant that the courts have not resolved the legislative or adjudicative character of administrative land use decisions on a case by case basis, but instead have established a generic rule that variances, use permits, subdivision maps, and similar proceedings are necessarily adjudicative.

Id. at 518-519, n.8.

In conclusion, the question of whether an action is legislative or quasi-judicial depends on a balancing of the factors considered in the cases cited above. It does not require the presence of all of them. The fundamental factor is fairness in cases in which specific governmental action is proposed to be taken with respect to specific private property.

2. Requirements of Procedural Due Process

As shown above, the land use case law is of limited use in determining when due process requirements should be afforded an individual. Once it is determined, however, that the proceeding is quasi-judicial, the next inquiry becomes: "what process is due an individual?" The California Supreme Court has said that procedural due process in an administrative setting requires notice of the proposed action; the reasons for the action; a copy of the charges and materials on which the action is based; and the right to respond before an impartial, noninvolved reviewer. Burrell v. City of Los Angeles, 209 Cal. App. 3d 568, 581 (1989), cert. denied, 110 S. Ct. 838 (1990) (citing Williams v. County of Los Angeles, 22 Cal. 3d 731, 736-737 (1978)).

In Burrell, the court also analyzed the due process requirements under federal law. According to federal law, an individual entitled to procedural due process should be given the following: notice of the proceeding; disclosure of evidence; the right to present witnesses and to confront adverse witnesses; the

right to be represented by counsel; a fair and impartial decisionmaker; and a written statement by the fact finders as to evidence relied upon and the reasons for the determination made. Burrell v. City of Los Angeles, 209 Cal. App. 3d 568, 577 (1989).

Of these due process requirements, the questions raised by the present series of hypotheticals regarding early councilmember involvement in the development approval process pose two issues: 1) impartiality of the decisionmaker, and 2) source and disclosure of evidence.

3. Due Process Requires the Right to an Impartial Tribunal

Specific requirements for procedural due process vary with the situation and the interests involved. Applebaum v. Board of Directors, 104 Cal. App. 3d 648, 657 (1980). The right to a fair trial by a fair tribunal is a basic requirement of due process which applies to administrative agencies which adjudicate. Withrow v. Larkin, 421 U.S. 35, 46 (1975). Biased decisionmakers are constitutionally impermissible. Id. at 47. Even the probability of unfairness is to be avoided. Id.

It is appropriate to discuss at this point the case of City of Fairfield v. Superior Court, 14 Cal. 3d 768 (1975). In this case, petitioners claimed they had been denied a fair hearing on an application for a planned unit development permit. The case arose on a petition for a writ of prohibition under the Code of Civil Procedure section 1094.5. Petitioners tried to depose two (2) councilmembers about their reasons for voting to deny the use permit. The California Supreme Court disallowed the deposition questions, in part because the city councilmembers' motives were inadmissible evidence under Code of Civil Procedure section 1094.5.

The Fairfield case essentially discusses the issue of how properly to prove bias and unfairness in an administrative or quasi-judicial proceeding, that is, it discusses an evidentiary issue. The court held that the attempted method of proving unfairness in the proceeding, i.e., deposition of the councilmembers as to their reasoning, was improper. The Fairfield court did not discuss or decide what types of proceedings were quasi-judicial as opposed to legislative. The city council procedure under review in the Fairfield case had many quasi-legislative characteristics, although the court held that the city council was acting in a quasi-judicial capacity when it voted to deny the planned unit development permit.3 It

3The Fairfield court's ambivalence on this issue is illustrated by the fact that the court itself pointed out that it

was not asked to review a city council decision which was an adjudication of disputed facts or involved application of specific standards to already found facts (i.e., quasi-judicial proceedings). The court further noted that the city council in the underlying action had only to decide whether a proposed project would serve the "public interest" under a zoning ordinance that had no specific standards for granting or denying the use permit. 14 Cal. 3d at 779-780.

also did not discuss the procedural due process requirements for quasi-judicial hearings. The reader should be cautioned not to give the Fairfield case an overbroad interpretation. The Fairfield case does not discuss, let alone decide, what adequate procedural safeguards must be present to guarantee a fair quasi-judicial proceeding.

In this opinion we do not attempt to demonstrate how a party should go about proving that a hearing was unfair because of an impermissibly biased decisionmaker, which was the issue in Fairfield. Rather, the task of this opinion is to point out a few traps for the unwary that may result in fundamentally unfair quasi-judicial proceedings.

In reaching its holding, the Fairfield court made the following off-cited quote: "A councilman has not only a right but an obligation to discuss issues of vital concern with his constituents and to state his views on matters of public importance." 14 Cal. 3d at 780.

Although the Fairfield court did not appear to base its holding on the constitutional right to petition one's government to redress grievances (U.S. Const. 1st Amendment; Cal. Const. art. I, section 3), the above-cited quote made in that case appears to adhere to those constitutional principles. We agree that members of the public have a constitutional right to petition their city government to resolve their economic and business issues. See, e.g., Matossian v. Fahmie, 101 Cal. App. 3d 128, 136 (1980) (holders of existing liquor licenses have a right to act in combination to protest the granting of another person's liquor license). Rather, we attempt to establish minimally required procedural safeguards for quasi-judicial land use proceedings.

Certainly, developers, community planning and citizen groups and interested citizens are petitioning their city government when they become involved with the city's procedures for granting or denying a land use permit. This opinion does not attempt to argue that these groups should be denied access to councilmembers. Rather, we attempt here to establish the

minimally required standards of fair procedures to ensure that all groups get equal opportunity for access to the council. We also attempt to point out the legal pitfalls that may result if that minimally required equal access is denied. The pitfalls pointed out here arise from the constitutionally based procedural due process requirements. It is worth noting perhaps that another body of law based on statute is formed on the same principles, i.e., to provide fundamental fairness to all groups and individuals in obtaining access to governmental

decisionmaking. That law is the Ralph M. Brown Act, the California Open Meetings law.

4. Categories of Bias that Destroy an Administrative Board's Impartiality

Since there is a paucity of cases in the land use area involving this issue, it is useful to apply the reasoning of cases discussing the boundaries of proper judicial behavior as well as that of other administrative boards.

The United States Supreme Court has disqualified judges and decisionmakers without a showing of actual bias in many situations. See, Prygoski, Due Process and Designated Members of Administrative Tribunals, 33 Admin. L. Rev. 441, 454 (1981), citing Crampton v. Department of State, 395 Mich. 347, 235 N.W. 2d 352 (1975). It should be noted that parties before a quasi-judicial tribunal "are entitled to the same fairness, impartiality and independence of judgment as are expected in a court of law." Jarrott v. Scrivener, 225 F. Supp. 827, 833 (1964). Thus, the same standards that apply to judges also apply to administrative boards. As stated in National Labor Relations Board v. Phelps, 136 F. 2d 562, 563 (5th Cir. 1943):

> . . . ┌Fσor a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge. Indeed, if there is any difference, the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency been relaxed.

The unanimous Michigan Supreme Court in Crampton categorizes these disqualifications and describes them as situations in which "experience teaches that the probability of actual bias on the part of the judge or the decisionmaker is too high to be constitutionally tolerable." Prygoski, Due Process and Designated Members of Administrative Tribunals, supra, at 455. For the probability of actual bias to be constitutionally intolerable, the allegedly biased decisionmaker usually falls within one of four categories, where the decisionmaker:

1. Has a direct pecuniary interest in the outcome;
2. Has been the target of personal abuse or criticism from the party before him or her;
3. Is enmeshed in other matters involving petitioner;

or

4. Might have prejudged the case because of prior participation as an accuser, investigator, fact finder or initial decisionmaker.

Id. at 455.

The meaning and scope of each of these four categories are amplified below.

a. Pecuniary Interest in Outcome Destroys Impartiality

California courts recognize that bias arising from pecuniary interests of board members often destroys an administrative board's impartiality. Applebaum v. Board of Directors, 104 Cal. App. 3d 648, 657 (1980). An objectionable financial stake in the outcome of a case was illustrated in Aetna Life Insurance Co. v. LaVoie, 475 U.S. 813 (1986). In Aetna, the Supreme Court held a judge to be impermissibly partial when he failed to recuse himself from an appeal brought by an insurer, while the justice was suing another insurer on a similar basis. His vote in the appeal resulted in a favorable money judgment in his own lawsuit. This was clearly an objectionable pecuniary interest in the outcome.

This category of bias is often the easiest to recognize. However, the more subtle forms of involvement are not as easily detected; these are discussed below.

b. Personal "Embroilment" In a Dispute Voids the Administrative Decision

This category of bias is characterized by prior personal relationships involving personal animosity, abuse or criticism. In other words, a councilmember's partiality would be tainted if an individual who had a running controversy with the councilmember came before the council for decision on a matter.

This scenario is demonstrated in Mennig v. City Council, 86 Cal. App. 3d 341 (1978), where a local police chief became embroiled in a political dispute with the city council which then voted to dismiss him. A running dispute between the police chief and the city council developed over the administration of the police department. The police chief appealed the city council's

dismissal to the civil service commission. The commission recommended that the police chief only be suspended without pay for sixty (60) days since none of the charges against him were supported by substantial evidence. But the city council disapproved this recommendation by adopting a resolution discharging the police chief.

The trial court held the resolution invalid due to the personal involvement of the council. The court of appeal affirmed, holding that the council members had become personally embroiled in the controversy and thus were disqualified from adjudicating the dispute. The court set forth the test of the ability of the administrative body to act as: "[W]hether in light of the particular facts 'experience teaches that the probability of actual bias on the part of the . . . decisionmaker is too high to be constitutionally tolerable.'" Id. at 350 (citing Withrow v. Larkin, 421 U.S. 35, 47 (1975)). In Mennig, the court found this test to be satisfied.

c. Councilmember Enmeshed in Other Matters With Party Before Council

A councilmember who is "enmeshed" in other matters involving a party before the council may be disqualified for personal bias. The test set forth in Mennig is also applicable to this category of bias. Thus, whether a councilmember is disqualified would depend on the "probability of actual bias."

d. Prior Involvement May Culminate in "Prejudged Cases"

According to the hypotheticals presented at the beginning of this opinion, councilmembers are involving themselves early on in the development approval process. Some are gathering information, while others are giving direction. In addition, some councilmembers are communicating with third parties regarding particular projects. This involvement is relevant since many of the projects in the development approval process will come before the City Council for adjudication. Thus, this prior involvement may culminate in prejudged cases, destroying an individual's right to an impartial tribunal.

Such a scenario is referred to as "combination of functions." In other words, it can be argued that a councilmember's

involvement with a project constitutes an impermissible combination of investigatory and adjudicatory functions in the City Council. The federal position on this issue is that the combination of investigative and adjudicatory functions in an administrative agency does not, without more, constitute a violation of due process. Withrow v. Larkin, 421 U.S. 35, 58 (1975). However, this does not preclude a determination "from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high." Id. at 58.

California has taken the same approach to the "combination of functions" argument. See, e.g., Applebaum v. Board of Directors, 104 Cal. App. 3d 648, 658 (1980). In Applebaum, nearly one-half of the members of the panel reviewing a decision to suspend a physician's staff privileges were also members of the committee which made the original suspension decision. The court concluded that this scenario presented a "practical probability of unfairness." Id. at 659. In this situation, "the risk of prejudgment or bias was too high to maintain the guarantee of fair procedure." Id. at 660.

While the majority of the case law in this area involves licensing or disciplinary hearings, the principles are applicable to all administrative bodies that adjudicate. When councilmembers interfere early on in the development approval process of a project, there may be a "practical probability of unfairness" when the same project later appears before them for approval. The nature of involvement is crucial to such a finding. If a councilmember's actions are tantamount to directing lower level planning staff, the councilmember is, in effect, acting as the decisionmaker at the lower level. This situation is analogous to that held invalid in Applebaum. However, if a councilmember is merely making inquiries, it is doubtful that the councilmember would be disqualified as a decisionmaker.

Some level of involvement is permissible. For example, mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not disqualify a decisionmaker. Burrell v. City of Los Angeles, 209 Cal. App. 3d 568, 578 (1989) (citing Withrow v. Larkin, 421 U.S. 35, 47 (1975)). This rule applies with respect to the probability of bias in the tribunal. However, this issue may also arise under the disclosure of evidence requirement of procedural due process, and may have very different legal consequences, as discussed in depth below.

A decisionmaker is also not disqualified for taking a

position on a policy issue related to the dispute in the absence of a showing that the decisionmaker cannot judge a particular dispute fairly on its own circumstances. Id. at 578. While councilmembers are not unequivocally banned from taking part in the investigatory process, they must consider the very real threat that a court may conclude that their involvement constitutes an intolerably high risk of unfairness.

5. Ex Parte Contacts Can Influence the Judgment of the Decisionmaker to Such an Extent that an Individual is Deprived of a Fair and Impartial Hearing

An individual's right to a fair and impartial hearing can also be destroyed by the effect of ex parte contacts upon decisionmakers. This is distinguishable from the earlier discussion of types of bias that disqualify decisionmakers. This situation can arise when a decisionmaker receives contacts from a third party or higher level official that may potentially bias the decisionmaker. One example of this scenario could involve city councilmembers directing or taking actions which have the effect of directing lower level planning staff who are responsible for initial decisions in the development approval process. Such direction may result in intimidation and pressure for the lower level decisionmaker to alter his or her own professional, objective opinion. Another example could involve city councilmembers directing the Planning Director at an early stage. This, too, may influence the judgment of the Planning Director. This situation can also arise when councilmembers receive contacts from outside interest groups. Such contacts from third parties regarding projects before the city council may cause a councilmember to prejudge a particular project.

This pressure upon a decisionmaker can influence the decision to such an extent that an individual is deprived of a fair and impartial hearing. This was the holding in Jarrott v. Scrivener, 225 F. Supp. 827 (1964), where the influence on subordinate government employees by high government officials was of a character which deprived plaintiffs of a fair and impartial hearing. Two subordinate board members were told by highly placed officers of the federal and Washington, D.C. governments that a favorable decision would be pleasing, while an unfavorable decision would be displeasing. The officials had the authority to give benefits or not to give benefits to subordinate employees. The court recognized that the pressure was not exerted with cruelty. However, the court stated: "[T]he pressures were nevertheless real, and the Board members contacted could not fail to be aware that they would incur administrative

displeasure if they decided the appeal unfavorably." Id. at 834. This is the same danger associated with councilmembers contacting lower level planning staff. Outside influence on individual councilmembers also runs the risk of denying an individual a fair and impartial tribunal.

6. Due Process Also Requires Disclosure of Evidence by Administrative Tribunals Which are Required to Make a Determination After a Hearing

The City Council is required to disclose evidence it considers in reaching a decision at a quasi-judicial hearing. Thus, if prior involvement in the development approval process affects a councilmember's decision on a project, such involvement must be disclosed at the hearing. This involvement includes councilmember contact with third parties outside of an individually noticed hearing. Due process rights of the party before the City Council are violated if this evidence is not disclosed.

Due process mandates that an administrative tribunal which is required to make a determination after a quasi-judicial hearing disclose evidence at the hearing that forms the basis for decision. Administrative tribunals cannot act upon their own information. English v. City of Long Beach, 35 Cal. 2d 155, 158 (1950). In addition, an administrative tribunal cannot consider anything as evidence that was not introduced at a noticed hearing or a hearing where the parties were present. Id. The court in English elaborated as follows: "A hearing requires that the party be apprised of the evidence against him so that he may have an opportunity to refute, test, and explain it, and the requirement of a hearing necessarily contemplates a decision in light of the evidence there introduced." Id. at 159 (citing La Prade v. Department of Water and Power, 27 Cal. 2d 47, 52 (1945)).

Other California case decisions are in accord with this standard for disclosure of evidence. For example, in Corcoran v. San Francisco City and County Employees Retirement System, 114 Cal. App. 2d 738, 745 (1952), the court reasoned as follows: "[Quasi-judicial] boards act as judicial bodies, with a limited jurisdiction. While not bound by technical rules of judicial procedure, they must afford the parties appearing before them a reasonably fair hearing. They cannot, lawfully, decide cases on evidence not submitted to or known by the other side."

The above standards clearly indicate that the City Council must disclose the source of the evidence it considers in making a decision. This requirement ensures that the party before the

City Council has an opportunity to refute or explain any adverse evidence.

A city board must disclose independent fact gathering. In La Prade v. Department of Water & Power, 27 Cal. 2d 47 (1945), an ex parte contact problem arose where an independent investigative report was made by a city board representative but not offered into evidence. The court states:

> ┌Tσhe action of such a tribunal based upon the report of an investigator, assuming it is competent evidence (citation omitted), when forming the basis for the tribunal's determination, is a denial of a hearing, unless it is introduced into evidence and the accused is given an opportunity to cross-examine the maker thereof and refute it. Id. at 52.

The court remanded the matter to the board for further consideration. See, also, Bank of America v. City of Long Beach, 50 Cal. App. 3d 882, 889, n.2 (1975) (no fair hearing where reports were relied upon by the city council, but not received in evidence).

In addition, councilmembers must disclose evidence gathered from viewing a location at issue in a proceeding before it. In Safeway Stores, Inc. v. City of Burlingame, 170 Cal. App. 2d 637, 647 (1959), a city council decision was reversed in part because "members of the council, either individually or collectively, viewed the locale" and did not set forth the facts obtained from this observation in the record.

However, in Flagstad v. City of San Mateo, 156 Cal. App. 2d 138 (1957), councilmembers viewed property outside of the hearing to decide whether to grant a variance. The court upheld the council's activity based on the fact that there was no concealment. "Those protesting the variance were free to challenge any views so expressed . . . ." Id. at 141.

Thus, case law clearly holds that any evidence gathered outside of a hearing and relied upon as a basis for decision, must be disclosed to all interested parties.

B. CHARTER LIMITATIONS: Express Language of San Diego City Charter Limits An Individual Councilmember's Ability to Direct Planning Department Staff.

The City of San Diego is a council-manager form of government that was carefully crafted to ensure a system of separation of powers. The council is the policymaking body and the city manager is the chief administrator. For further discussion of

this separation of powers, see San Diego City Attorney Opinion No. 86-2 (1986) and Opinion No. 86-7 (1986).

Section 22 of the San Diego City Charter prohibits interference by individual members of council with administrative service. Section 22 states, in pertinent part, as follows:

> . . . .
>
> (b) Except for the purpose of inquiry, the Council and its members shall deal with that part of the administrative service for which the City Manager is responsible solely through the City Manager or his designated representative and not through his subordinates.

Thus, section 22 expressly prohibits a councilmember from contacting subordinates under the City Manager's supervision, except for the purpose of inquiry.

There is no single charter section similar to section 22 that expressly delineates the line of authority between the Planning Department and the City Council. However, section 15 of the San Diego City Charter expressly requires a majority of Council to do business. Thus, an individual councilmember may not direct Planning Department staff since this is, in effect, doing business without a majority of the City Council present.

A city charter that is adopted under the home rule provisions of the constitution, such as San Diego's Charter, operates as an instrument of limitation on the exercise of power over all municipal affairs which the city is assumed to possess. City of Grass Valley v. Walkinshaw, 34 Cal. 2d 595 (1949). Thus, a city has full control over its municipal affairs except as clearly and explicitly curtailed by the charter. Id.

Section 15 of the San Diego Charter provides, in pertinent part, as follows:

> A majority of the members elected to the Council shall constitute a quorum to do business, but a less number may adjourn from time to time and compel the attendance of absent members in such manner and under such penalties as may be prescribed by ordinance.
>
> Except as otherwise provided herein the affirmative vote of a majority of the members elected to the Council shall be necessary to adopt any ordinance, resolution, order or vote; . . . .

Section 15 "clearly and explicitly" curtails a councilmember's ability to individually direct planning staff. It takes five (5) council votes to direct planning staff. When one (1) councilmember directs or takes action tantamount to directing planning staff, that councilmember is exceeding his or her authority under the Charter.

IV. LEGAL ANALYSIS

A. Hypothetical No. 1:

Councilmember A's request to review all projects of a certain size in the Councilmember's district prior to Planning Department approval raises many issues. The Councilmember's intent is relevant to each issue. If Councilmember A intended only to review the projects to keep apprised of development in the Councilmembers' district, there may be no problem. However, if Councilmember A intended to comment or get involved in the development approval process, problems may arise.

Assuming Councilmember A intended to become involved in the development approval process, the doctrines of procedural due process and charter limitations may limit Councilmember A's involvement.

1. Due Process

The nature of each project with which Councilmember A is involved is relevant in determining whether due process protections are applicable. As stated earlier, the bulk of due process requirements only apply to quasi-judicial proceedings of the city council. The distinction between legislative and quasi-judicial actions is set forth earlier in this opinion. Assuming the project requires a proceeding that is quasi-judicial, due process mandates Councilmember A to be an impartial decisionmaker and to disclose any evidence that forms the basis of A's decision.

Of the categories of bias that destroy impartiality of a decisionmaker, Councilmember A in this hypothetical runs the risk of becoming disqualified due to "prior involvement" with a project. By being involved in the development approval process of a project that will later come before the Council for approval, Councilmember A hazards a court finding that "the risk of prejudgment or bias ┌isσ too high to maintain the guarantee of fair procedure." Applebaum v. Board of Directors, 104 Cal. App. 3d 648, 660 (1980). The nature of Councilmember A's involvement is crucial to such a finding. In Applebaum, such a finding was made based on the fact that almost one-half of the members of a panel reviewing a decision to suspend a physician's staff

privileges were also members of the committee which made the

original suspension decision. Thus, it is clear that if Councilmember A makes preliminary decisions on a project that will be before the Councilmember later, the Councilmember will be disqualified from voting on that project.

Councilmember A is not banned from all involvement in the development approval process. Some level of involvement is permissible. Councilmember A may become familiar with the facts of a case gained in the performance of the Councilmember's duties. Burrell v. City of Los Angeles, 209 Cal. App. 3d 568, 578 (1989) (citing Withrow v. Larkin, 421 U.S. 35, 47 (1975)). However, the Councilmember must disclose the nature and source of any evidence gathered. In addition, Councilmember A may take a position on a policy issue related to the project so long as the Councilmember can judge the project fairly on its own circumstances. Id. Thus, the type of action Councilmember A intends to take is relevant in determining whether disqualification is warranted.

Another due process safeguard requires Councilmember A to disclose evidence considered in reaching a final decision at a hearing. Thus, if the Councilmember gathers evidence and uses it in reaching a decision, the Councilmember is required to disclose this evidence at the hearing.

2. Charter Limitations

Section 15 of the Charter expressly curtails Councilmember A's ability to individually direct Planning Department staff. It takes five (5) council votes to direct planning staff.

Overall, Councilmember A's memorandum is not objectionable since councilmembers are entitled to keep abreast of development in their districts. However, future action regarding specific projects may raise the issues discussed above.

B. Hypothetical No. 2:

Councilmember B's comments on the draft EIR also raise issues under procedural due process and charter limitations. Councilmember B commented on a draft EIR, the final of which will potentially come before the Councilmember for consideration in approving or disapproving this particular project. In addition, Councilmember B's comments could change the EIR in a manner consistent with B's position. This change would affect other decisionmakers and potentially alter the final decision.

1. Due Process

As stated above, an individual is entitled to the safeguards of due process only in quasi-judicial council proceedings. This particular project consists of a coastal development permit, revisions to a vesting tentative map and a planned residential

development permit. Each proceeding requires individual notice to all property owners within 300 feet of the property in question. In addition, land use case law characterizes all three of these actions as quasi-judicial. See, City of Fairfield v. Superior Court, 14 Cal. 3d 768, 773 (1975) (the granting of planned unit development permits is primarily a quasi-judicial action); Horn v. County of Ventura, 24 Cal. 3d 605, 612 (1979) (the approval of tentative subdivision maps is a quasi-judicial action); and Patterson v. Central Coast Regional Comm., 58 Cal. App. 3d 833, 840-841 (1976) (the issuance of coastal development permits is a quasi-judicial action).

Next, it is important in our analysis to determine if the EIR will come before Councilmember B for consideration in making a decision on the final project. Thus, the decisionmaking process for each type of project must be considered at this point.

a. Coastal Development Permit

San Diego Municipal Code (SDMC) section 105.0208 provides that the Planning Director shall have the authority to either approve, conditionally approve or deny the application for a coastal development permit. The decision of the Planning Director may be appealed to the Planning Commission (SDMC section 105.0211). The decision of the Planning Commission may be appealed to the City Council. Id.

b. Vesting Tentative Map

The Subdivision Board approves tentative maps (SDMC section 102.0307). But, tentative subdivision maps which include proposed vacation of public right-of-way require City Council approval. Id. The subdivider can appeal the action of the Subdivision Board to the Planning Commission. (SDMC section 102.0308.) In addition, appeals from the action of the Planning Commission may be made to the City Council. Id. When the final map is acceptable, it is presented to the City Council for approval. (SDMC section 102.0313.) Government Code section 66458 requires the City Council to approve the map if it conforms to all the requirements applicable at the time of approval. It also requires the City Council to disapprove the map if it does not conform to the requirements.

c. Planned Residential Development Permit

San Diego Municipal Code section 101.0901(E) allows the Planning Director to grant a planned residential development permit if the Director determines that the application is complete and conforms with all city regulations. An appeal can be made to the Planning Commission (SDMC section 101.0901(F)). The decision of the Planning Commission may also be appealed to

the City Council. (SDMC section 101.0901(G).)

Based on the above, the Planning Director, Planning Commission and the City Council all potentially rely on this draft EIR as a basis for approving or disapproving the project. In addition, it is very likely that this project will come before the Council for approval, either directly or on appeal. It is arguable that Councilmember B's involvement with the draft EIR is an impermissible combination of investigatory and adjudicatory functions in the City Council. While this combination of functions, without more, does not constitute a violation of due process, a determination may be made by the facts and circumstances that the "risk of unfairness is intolerably high." Withrow v. Larkin, 421 U.S. 35, 58 (1975).

The risk of unfairness in this situation is intolerably high. A councilmember is becoming involved in a process which will later become one factor the councilmember must consider in approving or disapproving the project. Not only does the councilmember's prior involvement culminate in prejudgment, but the councilmember's influence may alter the EIR which is used by other councilmembers in deciding whether to approve the project.

It is the policy of the Planning Department that an EIR be a neutral document for use in discretionary decisions. By influencing and creating the change in the EIR, Councilmember B's actions will affect other councilmembers' decisions on a project. This raises due process issues. In addition, CEQA will be violated if the EIR is no longer accurate as a result of pressure on planning staff to alter their professional judgment in the EIR's preparation.

The effect of Councilmember B's comments on planning staff is also relevant to due process considerations. During the CEQA public review period, certain entities are invited to comment and copies of the draft EIR are made available to members of the public. Planning staff receives the comments and responds. As with all councilmember contacts with lower planning staff, the risk of intimidation and coercion, although unintended, is very high. Thus, the effect of councilmember comments on planning staff may be different from those of an average citizen. As in Jarrott v. Scrivener, 224 F. Supp. 827, 834 (1964), although the pressure by high government officials was not exerted with

cruelty, "the pressures ┌areσ nevertheless real, and the Board members contacted could not fail to be aware that they would incur administrative displeasure if they decided the appeal unfavorably."

2. Charter limitations

As analyzed above, Charter section 15 limits Councilmember B's authority to individually direct planning staff.

C. Hypothetical No. 3:

This fact situation raises the same due process issue of the right to a fair and impartial hearing. Assuming the proposed project is quasi-judicial, an individual's right to a fair and impartial hearing is tainted by this memorandum at two levels. The first level is based on Councilmember C's prior involvement in a project that will later come before the Councilmember for approval. The second level is based on the effect of Councilmember C's memorandum on lower level decisionmakers. Both levels of bias are discussed below.

First, it is arguable that Councilmember C's "prior involvement" with this project disqualifies the Councilmember from voting on the final project. Councilmember C's prior involvement has culminated in prejudgment of the project. This prejudgment is registered when Councilmember C expressed opposition to the entire project unless the road alignment is shifted to the north. Councilmember C's memorandum expressed an attempt to alter the Planning Department's recommendation. It would seem likely that a court would hold that in this situation, "the risk of prejudgment or bias was too high to maintain the guarantee of fair procedure." Applebaum v. Board of Directors, 104 Cal. App. 3d 648, 660 (1980).

Second, the effect of Councilmember C's memorandum on lower level decisionmakers may disqualify the lower level decisionmakers from rendering a fair and impartial decision. In other words, an individual at the Planning Director's hearing could argue that the Planning Director was biased by receipt of Councilmember C's memorandum. This situation is analogous to the one described in Jarrott v. Scrivener, 225 F. Supp. 827 (1964). In Jarrott, the court held that plaintiffs were deprived of a fair and impartial hearing where two members of a board of zoning adjustment were secretly told by highly placed government officers that a favorable decision would be pleasing, while an unfavorable decision would be displeasing.

The threat of this argument being raised with respect to this specific project is minimal, in light of the fact that the Planning Director's recommendation stood. However, such a threat is likely if the Planning Director or lower level staff, in fact, had altered their recommendations.

Based on the above, this memorandum could not only disqualify Councilmember C from voting on this project, but it could also taint the entire development approval process of this project.

For these reasons, this memorandum is not acceptable and should not be used.

D. Hypothetical No. 4:

This fact situation raises the same two levels of impartiality discussed above. Councilmember C requested that the Planning Director's hearing on a major land development project be continued due to the unresolved road alignment issue. This can be interpreted as a request to continue the hearing or as direction to continue the hearing. There appears to be no problem with a councilmember requesting action from the Planning Department. However, this must be qualified. If by requesting action, the councilmember is influencing lower level planning staff, the development approval process may be tainted.

More problems arise if Councilmember C is directing planning staff to continue the hearings. First, Councilmember C's involvement early on may disqualify the Councilmember from voting. (See analysis above.) Second, the effect of Councilmember C's direction on lower level planning staff may result in intimidation, thereby tainting the entire development approval process. Third, as argued above, Charter section 15 curtails a councilmember's authority to individually direct planning staff.

E. Hypothetical No. 5:

The meeting called by Councilmember D seems to be one solely for information regarding a project in the Councilmember's district. In our analysis, we have stated that a councilmember can make inquiries of planning staff, but cannot direct planning staff. However, the distinction between inquiry and direction is not always clear.

For example, although Councilmember D was merely inquiring into specific areas of the draft EIR, the councilmember's point of view was made clear to the planning staff. In this situation, the risk of bias and unfairness must be weighed against the Councilmember's obligation to be adequately informed to better

serve constituents. The risk of bias and unfairness is not as high in this situation as in the previous situations. However, there exists a potential for bias and unfairness if the briefing involves lower level planning staff, as opposed to a principal planner, as in this case. Lower level planning staff are more susceptible to intimidation and thus may be influenced by a councilmember's point of view. Thus, while this briefing appears to be properly conducted, a briefing involving lower level planning staff may not be appropriate.

F. Hypothetical 6:

Councilmember E wished to tour ten (10) completed residential projects as well as ten (10) residential projects now in progress. This hypothetical raises the due process issue of source and disclosure of evidence used by a tribunal in rendering a decision.

The bulk of due process requirements only apply to quasi-judicial proceedings of the City Council. Thus, it is important to determine the nature of each project Councilmember E wishes to view. If the project to be viewed requires a quasi-judicial proceeding, then facts gathered at the viewing of the project that are used as a basis for decision must be disclosed at the hearing. Safeway Stores, Inc. v. City of Burlingame, 170 Cal. App. 2d 637 (1959). If the facts are not disclosed, a party before the Council is denied a fair hearing because the party is not apprised of evidence against him or her and, thus, does not have an opportunity to refute or explain it. Failure to disclose evidence at a hearing may result in the City Council's decision being remanded or reversed, depending on the facts of each case.

The disclosure of evidence requirement is clearly inapplicable to the ten (10) completed residential projects Councilmember E wishes to view. However, this requirement is applicable to the ten (10) residential projects in progress, assuming they involve a quasi-judicial proceeding. Councilmember E may view these projects outside of the hearing so long as there is no concealment. See Flagstad v. City of San Mateo, 156 Cal. App. 2d 138 (1957), which upheld the disclosed activity of councilmembers who viewed property outside of the variance hearing. Due to the disclosure, interested parties were free to challenge the evidence.

For the above stated reasons, Councilmember E's request appears to be appropriate, provided that Councilmember discloses any evidence to be used as the basis for decision in a quasi-judicial proceeding.

G. Hypothetical No. 7:

This hypothetical involves negotiations to develop a draft amendment to a community plan between a developer and a councilmember. Both Councilmember F and the developer exchanged drafts of proposed community plan amendments without the participation or input of the Planning Department staff or the community planning group. The developer intended to file an application for a community plan amendment after it reached an agreement on a draft proposal with the Councilmember.

This hypothetical raises two procedural due process issues:

an individual's right to an impartial tribunal and an individual's right to know the source of the evidence used by a councilmember in reaching a decision. Assuming the community plan amendment is quasi-judicial, due process mandates that Councilmember F be an impartial decisionmaker and that F disclose any evidence that F considers in reaching a decision.

This Councilmember runs the risk of becoming disqualified from approving the proposed community plan amendment due to "prior involvement" with the developer. Councilmember F hazards a court finding that "the risk of prejudgment or bias ┌isσ too high to maintain the guarantee of fair procedure." Applebaum v. Board of Directors, 104 Cal. App. 3d 648, 660 (1980). In Applebaum, the court made such a finding based on the fact that almost one-half of the members of a panel reviewing a decision to suspend a physician's staff privileges were also members of the committee which made the original suspension decision.

In this situation, the risk of prejudgment is very high. Councilmember F is participating in the drafting of a community plan amendment along with a developer that will later come before the full Council for approval. Thus, the Councilmember is, in effect, preparing the proposed amendment to the community plan without input from planning staff or the community group. The Councilmember will subsequently be in a position to approve the very same amendment the Councilmember prepared. As in Applebaum, this activity undoubtedly biases the Councilmember and renders the Councilmember a partial decisionmaker.

The fact that the developer and the Councilmember conducted negotiations before the application for the amendment was filed does not alter this analysis. The Councilmember had prior involvement with a specific community plan amendment that will eventually come before the full Council for approval. This prior involvement biases the Councilmember regardless of when the application for amendment was filed.

Due process also requires disclosure of evidence by an administrative tribunal which is required to make a determination after a hearing. Administrative tribunals cannot act upon their own information. English v. City of Long Beach, 35 Cal. 3d 155, 158 (1950). In addition, an administrative tribunal cannot consider anything as evidence that was not introduced at a noticed hearing or a hearing where the parties were present. Id. The parties must be apprised of all of the evidence so that they may have an opportunity to refute or explain it.

Thus, Councilmember F must disclose any evidence gathered or received and used as a basis for decision. Contacts with the

developer must be disclosed to all parties involved. It must be noted that disclosure of these contacts does not necessarily cure all procedural due process defects. In other words, Councilmember F may still be disqualified for bias based on "prior involvement" with the project.

H. Hypothetical No. 8:

This hypothetical involves an application to rezone property, a community plan amendment, and other permits which have been denied by the Planning Commission. The matters were set to be heard by the full Council. Prior to the council hearing, PQR Corporation contacted Councilmembers G and H several times to discuss the applications. Assuming these proceedings are quasi-judicial in nature, these contacts raise the same two issues under the doctrine of procedural due process.

An individual is afforded the right to a fair and impartial decisionmaker in a quasi-judicial proceeding. Ex parte contacts can influence the judgment of the councilmember to such an extent that an individual is deprived of a fair and impartial hearing. Thus, both Councilmembers G and H must be fair and impartial when approving or disapproving this particular project. "Prior involvement," via ex parte contacts with a developer, may destroy Councilmembers G and H's impartiality.

Councilmember G's involvement arises from PQR's contacts with G and G's staff, complaining about the Planning Commission's rejection of PQR 's application. This "prior involvement" alone, may not disqualify G as a partial decisionmaker. There exists no facts to indicate that Councilmember G or G's staff did anything other than listen to PQR's complaint. However, there still exists the possibility that PQR's comments may influence Councilmember G to such an extent as to deprive an individual of a fair and impartial hearing. It should be noted that a councilmember's staff is considered to be the alter ego of the individual councilmember. Hence, ex parte communications with a

member of a councilmember's staff have the same legal consequences as ex parte communications with the individual councilmember.

Councilmember H's involvement, however, may be sufficient for a court to find that "the risk of prejudgment or bias ┌isσ too high to maintain the guarantee of fair procedure." Applebaum v. Board of Directors, 104 Cal. App. 3d 648, 660 (1990). Councilmember H is apprised of alternative proposals by PQR, including maps, drawings, etc. PQR attempts to negotiate a revised project that will be acceptable to Councilmember H. The PQR project, if approved, will be in H's district. If, as in

hypothetical No. 7, Councilmember H is participating in preparing or approving an alternative proposal, then it is likely that a court would find a high risk of prejudgment or bias sufficient to disqualify H.

In addition, based on the preceding authority, Councilmembers G and H must both disclose the communications with PQR regarding the proposed project at the hearing.

I. Hypothetical No. 9:

This hypothetical involves a member of the Planning Commission who met informally with members of a citizens' group with whom the Planning Commission member had formerly been affiliated, to discuss the details of an application to rezone a single parcel of land. These meetings and the subjects discussed were not disclosed at the Planning Commission's public hearing.

This situation also involves an individual's right to a fair and impartial tribunal, as well as the right to know what evidence is relied on by the administrative tribunal in reaching a decision. As stated, ex parte contacts can influence the judgment of the decisionmaker to such an extent as to deprive an individual of a fair and impartial tribunal. The rules that apply to the City Councilmembers also apply to the Planning Commissioners. In this situation, it is likely that the Commission member was influenced by the members of the citizens' group. The Commission member informally met with the citizens' group to discuss details of a specific application to rezone. Prior involvement with details of a specific application to rezone is the type of involvement that biases decisionmakers and disqualifies them from voting on particular projects. Also, just as with the City Council, the Commission member is required to disclose anything the member considers in reaching a decision on the application for a rezone.

J. Hypothetical No. 10:

In this hypothetical, Councilmember J renegotiated an already approved freeway interchange improvement agreement with a developer outside the presence of the City Manager, planning and engineering staff, and other interested parties. These facts raise the same two issues under procedural due process as in previous hypotheticals. In addition, this activity implicates Charter section 22.

Councilmember J's involvement in the renegotiation of the freeway interchange improvement agreement is such "prior involvement" that may cause a court to find a "risk of prejudgment or bias too high to maintain the guarantee of fair procedure." Applebaum v. Board of Directors, 104 Cal. App. 3d

648, 660 (1980). Once again, this hypothetical involves a councilmember who is negotiating, without the Manager or planning and engineering staff, an agreement that will come before the full Council for approval. Thus, Councilmember J will be in a position to approve an agreement that the Councilmember renegotiated. This involvement undoubtedly biases the Councilmember.

It is arguable that the renegotiations have been disclosed based on the fact that the agreement came back to the Council for a vote. Thus, arguably Councilmember J has not violated an individual's right to be apprised of evidence taken outside of the hearing. However, it is not clear whether disclosure of the renegotiations cures the procedural due process defect caused by bias and prejudgment.

This hypothetical also raises questions under Charter section 22. After Council formally approved the agreement and authorized the City Manager to sign it, Councilmember J met with GHI Corporation to renegotiate the agreement. The renegotiations took place outside the presence of the Manager, planning and engineering staff, and other interested parties. Section 22 of the San Diego City Charter prohibits interference by individual members of Council with administrative service. The Council had authorized the City Manager to sign the agreement, however, this authorization was circumvented by Councilmember J's actions to renegotiate this agreement. This conduct violates Charter section 22 and is not cured by the fact the renegotiated agreement was brought back to full Council for approval.

V. REMEDIES

Up to this point, this opinion has addressed the problems that arise when individual councilmembers participate at very early stages in the development approval process. As explained above, this participation raises serious concerns under the procedural due process requirements of the federal and state constitutions and the San Diego City Charter. At this juncture, the penalties for this activity are set forth. The penalties a councilmember may face include: remand or rehearing, disqualification of a councilmember or reversal of the council's decision, damages and attorney's fees, and possible removal from office for violation of section 22 of the Charter. Each penalty is discussed below.

A. Validity of an Administrative Decision

Civil Procedure Code section 1094.5 governs inquiries into the validity of administrative orders. Subdivision (a) thereunder states that a writ of mandamus may issue where 1)

there is a final administrative order, 2) a hearing was required to be given, 3) evidence was required to be taken, and, 4) the tribunal had fact finding discretion. These elements are implicit in all quasi-judicial proceedings. See, City of Coronado v. California Coastal Zone Conservation Commission, 69 Cal. App. 3d 570, 573 (1977); City of Fairfield v. Superior Court, 14 Cal. 3d 768, 773 n.1 (1975). Thus, section 1094.5 governs judicial review of all quasi-judicial proceedings.

1. Remand or Rehearing by a New Board

Subdivision (e) of section 1094.5 provides for remand where there is relevant, but improperly excluded, evidence at a hearing. Thus, a court will remand a decision if a councilmember bases his or her decision on unrevealed ex parte communications. See, La Prade v. Department of Water & Power, 27 Cal. 2d 47 (1943). The court may admit the evidence at the hearing on the writ without remanding the case in situations where the court is authorized by law to exercise its independent judgment on the evidence. C.C.P. section 1094.5(c).

However, a court may require rehearing by a "fresh new board," if an administrative board is found to be influenced by ex parte communications. See, Jarrott v. Scrivener, 225 F. Supp. 827, 836 (1964).

In addition, subdivision (a) of section 1094.5, allows the prevailing party to recover all expenses incurred in preparing the record for judicial review.

Attorneys' fees may also be awarded to a successful party in a mandamus proceeding pursuant to Code of Civil Procedures section 1021.5 This section codifies the private attorney general doctrine. It provides for attorney fees in any action that results in the enforcement of a public right which affects the public interest and confers a significant benefit on the general public. Under this doctrine, the significant benefits that will justify an attorney fee award do not have to represent a tangible asset, but may be recognized simply from the effectuation of a fundamental constitutional or statutory policy. Woodland Hills Residents Assn., Inc. v. City Council, 23 Cal. 3d 917 (1979).

2. Disqualification of Councilmember's Vote

A councilmember may be deemed disqualified from voting on or deciding a project that is before the City Council based on the councilmember's partiality. As explained above, the biased decisionmaker usually falls within one of four categories, where the decisionmaker:

a. Has a direct pecuniary interest in the outcome;

b. Has been the target of personal abuse or criticism from the party before him or her;

c. Is enmeshed in other matters involving petitioner; or

d. Might have prejudged the case because of prior participation as an accuser, investigator, fact finder or initial decisionmaker.

Thus, a court may find the Council's decision null and void based on the partiality of a councilmember. The Council's decision may be remanded for a new vote or reversed by the court.

B. Damages and Attorney's Fees for Violation of 42 U.S.C. section 1983.

42 U.S.C. section 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person with the jurisdiction thereof to the deprivation of any rights, privileges, or
>
> immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Local governments and municipal corporations are "persons" subject to liability under 42 U.S.C. section 1983 for violating another person's federally protected rights. Monell v. Department of Social Services, 436 U.S. 658 (1978). In addition, local government officials sued in their official capacities are "persons" under Section 1983 in cases where a local government would be suable in its own name. Id. at 690, n. 55.

42 U.S.C. section 1988 provides in pertinent part: "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." For a dated, but comprehensive review of Section 1988 attorney's fee awards, see Witt, "The Civil Rights Attorneys' Fees Awards Act of 1976," 13 Urb. L. 589 (1981).

Based on the above, if the City Council or an individual councilmember under color of law deprives an individual of their procedural due process rights under the United States Constitution, damages and attorney's fees may be levied against the City Council or the individual councilmember.

C. Penalties for Violating San Diego City Charter

Section 22 of the San Diego City Charter expressly prohibits interference by the Council and its members with administrative service under the City Manager. Violation of this provision by any member of the Council constitutes a misdemeanor. Section 22(c). The penalty for violating this section is removal from office by the Council or "for which the offending member may be tried by any court of competent jurisdiction and if found guilty the sentence imposed shall include removal from office."

VI. CONCLUSION

The appropriateness of a councilmember commenting or participating at very early stages in the development approval process when the matter will come before the Council in the future raises substantial issues under the procedural due process requirements of the federal and state constitutions and the San Diego City Charter.

A. Procedural Due Process

Councilmember involvement in the development approval process of a project that will later be before the Council for decision raises two distinct issues under the constitutionally based doctrine of procedural due process. The first involves an individual's right to an impartial tribunal. The second involves an individual's right to know what evidence is used by the Council in reaching a decision.

The bulk of the procedural safeguards, including the right to an impartial tribunal and the right to know what evidence is used, apply only to quasi-judicial proceedings of the City Council. Case law has characterized numerous land use projects as either legislative or quasi-judicial. This case law, however, provides limited guidance. Nonetheless, this distinction dictates which procedural due process requirements must be afforded an individual.

Assuming the Council's action is quasi-judicial, the California Supreme Court has said that procedural due process in an administrative proceeding requires notice of the proposed action; the reasons for the action; a copy of the charges and materials on which the action is based; and the right to respond before an impartial, noninvolved reviewer. Burrell v. City of Los Angeles, 209 Cal. App. 3d 568, 581 (1989) citing Williams v. County of Los Angeles, 22 Cal. 3d 731 (1978).

Of these requirements, the present series of hypotheticals raise the issues of: 1) impartiality of the decisionmaker; and, 2) source and disclosure of evidence.

1. Impartiality of the Decisionmaker

Due process requires that a councilmember be an impartial decisionmaker in a quasi-judicial proceeding. Four factors have been held to destroy an administrative board's impartiality. These factors are: 1) the decisionmaker has a direct pecuniary interest in the outcome; 2) the decisionmaker has been the target of personal abuse or criticism from the party before him or her; 3) the decisionmaker is enmeshed in other matters involving petitioner; or 4) the decisionmaker might have prejudged the case because of prior participation.

Councilmembers' early involvement in the development approval process falls within the "prior participation" category of bias. While the combination of investigative and adjudicatory functions in an administrative agency does not alone constitute a violation of due process, a court may find from the facts of a case before it that the "risk of unfairness is intolerably high." Withrow v. Larkin, 421 U.S. 35 (1975).

It is clear that if a councilmember is directing planning staff and hence, making lower level decisions, the councilmember is disqualified from voting on the final project. See Applebaum v. Board of Directors, 104 Cal. App. 3d 648 (1980). However, some level of involvement is permissible. Familiarity with the facts of a case gained by an agency in the performance of its statutory role does not disqualify a decisionmaker for bias. The decisionmaker may be required to disclose the facts to all interested parties.

Another level of the right to a fair and impartial tribunal is the effect ex parte contacts have on the judgment of the decisionmaker. This situation arises when a decisionmaker receives contacts from a higher level official that may bias the decisionmaker. Thus, an individual's right to a fair and impartial tribunal may be deprived if City Councilmembers are directing lower level planning staff who are responsible for initial decisions in the development approval process. Such direction may result in intimidation and pressure for the lower level decisionmaker to decide one way or another. This situation also arises when a councilmember receives contacts from an outside third party that may bias the councilmember in making a decision regarding a particular project. Thus, an individual's right to a fair and impartial tribunal may also be deprived if outside groups, such as developers and community groups, are contacting and negotiating details of specific projects with the councilmember.

2. Source and Disclosure of Evidence

The second issue raised by the facts under procedural due

process is disclosure of evidence by the Council used as a basis for decision. Due process requires the Council to disclose the nature and source of evidence it considers in forming its decision. Councilmembers must disclose independent fact gathering as well as evidence gathered from viewing a location that is at issue in a proceeding before it.

B. Charter Limitations

The City of San Diego is a council-manager form of government that was carefully crafted to ensure a system of separation of powers. This separation is exemplified by the section 22 prohibition of Council interference with administrative service. Section 22 expressly prohibits a councilmember from contacting subordinates under the City Manager's supervision, except for the purpose of inquiry.

While there is no single Charter section similar to section 22 that expressly delineates the line of authority between the Planning Department and the City Council, section 15 of the Charter expressly requires a majority of Council to do business. Thus, an individual councilmember may not direct Planning Department staff since this is, in effect, doing business without a majority of the Council present. It takes five (5) councilmember votes to direct planning staff. When one (1) councilmember directs planning staff, that councilmember is exceeding his or her authority under the Charter.

C. Remedies

The penalties a councilmember may face for early involvement in the development approval process include remand or rehearing of the City Council's decision, disqualifications of a councilmember's reversal of the City Council's decision, damages and attorney's fees, and possible removal from office if Charter Section 22 is violated.

Respectfully submitted,
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Attachments
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